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Indecent images and defamatory meaning in late modern societies: taking ordinary, reasonable readers outside their ivory tower

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Abstract – The article scrutinises a libel case which was brought by a claimant against the public prosecuting authority in England and Wales, asking the court to determine as a preliminary issue the meaning of a Charging Announcement. It proposes that this case is worth consideration because it illustrates how the arguably problematic interpretation of the offence of ‘making’ indecent images of children may extend beyond the dynamics of the criminal trial to colour the adjudication of civil disputes. The article also challenges the qualities of hypothetical referees in defamation cases and suggests that they need to be determined based on a realistic rather than an idealistic view of late modern, multi-mediated societies. The Savile scandal and other high-profile child sexual abuse cases have cultivated a climate of mistrust in which the ordinary reader is *reasonably* (and not *unduly*) suspicious and should therefore not be expected in this context to favour a less defamatory meaning over a more defamatory one.

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Background

In the case of *Bukovsky v the Crown Prosecution Service* (CPS),¹ the claimant was a well-known Soviet dissident resident in England. In April 2015, the CPS, the principal public prosecuting authority in England and Wales, issued a press release announcing that charges were to be brought against him. In factual terms, the case against Bukovsky was that he accessed and kept indecent images of children (IIOC). The incriminating material was found after law enforcement officers raided Bukovsky’s home before he was to testify in the inquiry into the murder of the former KGB officer, Alexander Litvinenko, who was poisoned by the Russian government in 2006 in London.² The release fuelled several Russian reports accusing Bukovsky of paedophilia.³ He then countered with a suit against the CPS for libel, misfeasance in public office and breach of the Human Rights Act 1998.

The Charging Announcement stated that the CPS had authorised Bukovsky’s prosecution for five charges of ‘making indecent images of children’ contrary to s 1(1)(a) of the Protection of

¹ *Vladimir Bukovsky v The Crown Prosecution Service* [2016] EWHC 1926 (QB).

² Home Office, *The Litvinenko Inquiry* (TSO 2016); see also reports on how unidentified third parties may have put the prohibited articles on the claimant’s computer as part of what is believed to be a Moscow-orchestrated kompromat trap aimed at discrediting his reputation: Andrew Higgins, ‘Foes of Russia say child pornography is planted to ruin them’ *The New York Times* (New York, 9 December 2016)

<https://www.nytimes.com/2016/12/09/world/europe/vladimir-putin-russia-fake-news-hacking-cybersecurity.html?_r=1> accessed 18 April 2017; Luke Harding, ‘Vladimir Bukovsky: “I’m on hunger strike for the British public”’ *The Guardian* (London 29 April 2016) <<https://www.theguardian.com/world/2016/apr/29/vladimir-bukovsky-russian-dissident-hunger-strike-litvinenko-uk-judicial-system>> accessed 18 April 2017.

³ Jenna Liffits, ‘Soviet Dissident Vladimir Bukovsky Set for Trial Monday’ *The Weekly Standard* (Washington, 9 December 2016) <<http://www.weeklystandard.com/article/2005787>> accessed 18 April 2017.

Children Act 1978, five charges of ‘possession of indecent images of children’ contrary to s 160 of the Criminal Justice Act 1988 and one charge of ‘possession of a prohibited image’ contrary to s 62(1) of the Coroners and Justice Act 2009.⁴ Bukovsky pleaded not guilty to the offences.⁵ In his view, the Announcement, which subsequently drew the mainstream media’s attention, falsely suggested that he was accused of being personally involved in the sexual abuse of children⁶ and that there was sufficient evidence to justify a prosecution for being present at the scene and making photographs of that abuse. The CPS did not allege that Bukovsky was guilty, or reasonably suspected, of any such conduct. They maintained that the Announcement bore less serious meanings to the effect that Bukovsky was to be charged with specific offences as identified in it; that there was sufficient evidence to support these charges and it was in the public interest to do so. It was accepted that, if Bukovsky was right about the meaning of the words in the Announcement, a defence of truth under s 2 of the Defamation Act 2013 could not succeed. The CPS further contended that irrespective of the single meaning to be attributed to the Announcement, a public interest defence would defeat the libel claim.⁷ There was no dispute that the Charging Announcement bore a meaning that was defamatory of the claimant.⁸ In this preliminary hearing, Warby J only had to determine the meaning of the Charging Announcement, the interpretation of which was disputed by the two parties. The question put before him was: what kind of child sexual offences would the ordinary reasonable reader have taken the CPS Announcement to suggest?⁹ The Defamation Act 2013 has now removed the presumption in favour of jury trial in defamation cases. Such cases are now heard by a judge alone, unless the court orders otherwise.¹⁰ As a result, the core issues of what the words mean and whether they have caused ‘serious harm’ under s 1 of the Act are decided by the judge.

The meaning of the words complained of

The legal test of what words mean is what an ordinary, reasonable person would think they mean. The courts are not concerned with what the author or publisher intended, nor with what any actual reasonable reader may have understood. A statement is held to have a single meaning, ‘that is a meaning which the court finds would be understood by the hypothetical reasonable reader’.¹¹ Two types of meaning are recognised in the English law of defamation: first, the natural and ordinary meaning of the words, which is not limited to the obvious and

⁴ CPS, ‘Vladimir Bukovsky to be prosecuted over indecent images of children’ (CPS, 24 April 2015) <http://www.cps.gov.uk/news/latest_news/vladimir_bukovsky_to_be_prosecuted_over_indecent_images_of_children/> accessed 4 April 2017.

⁵ Bukovsky’s criminal trial at Cambridge Crown Court commenced in December 2016, but after two days of evidence the jury was discharged following his hospital admission. The case was adjourned for review in January 2017. The defence presentation was postponed until July 2017; see ‘Vladimir Bukovsky child abuse images trial is halted’ *BBC News* (London, 14 December 2016) <<http://www.bbc.co.uk/news/uk-england-cambridgeshire-38318209>> accessed 26 April 2017.

⁶ *Bukovsky* (n 1) [2]; see also [13].

⁷ Defamation Act 2013, s 4. The CPS further submitted that the misfeasance claim would fail, given that there was no wilful or reckless wrongdoing; and that the Human Rights Act claim would also fail for essentially the same reasons; *Bukovsky* (n 1) [4].

⁸ *Bukovsky* (n 1) [9].

⁹ *ibid* [17].

¹⁰ Defamation Act 2013, s 11.

¹¹ *Rothschild (the Hon Nathaniel Philip Victor James) v Associated Newspapers Ltd* [2012] EWHC 177 [23] (Tugendhat J), applying *Slim v Daily Telegraph* [1968] 2 QB 157.

literal meaning, but extends to any inference which the hypothetical reader would draw from the words; and second, innuendo meaning, which arises when an apparently innocuous statement is combined with special knowledge or extrinsic facts known to others to become defamatory.¹² The principles of deciding meaning were summarised in *Jeynes v News Magazines Ltd.*¹³ They are frequently cited in the increasingly common preliminary issue trials for the determination of meaning and we shall return to these later.

The meaning of the words as a matter of law: the knotty meaning of 'making'

The main statute dealing with child pornography offences in England and Wales is the Protection of Children Act 1978. Its provisions aim to safeguard children from degradation and sexual exploitation,¹⁴ and have subsequently been updated several times. The 1990s saw the demonisation of paedophiles and rising public concerns over the availability of illegal Internet content.¹⁵ Fuelled by revelations of offences in childcare homes and sexual offences involving Catholic priests, the paedophile panic built up during this decade.¹⁶ In 1994, computer pornography was described by the House of Commons Home Affairs Committee as a 'new horror'.¹⁷ Following the Committee's recommendations, Parliament amended the Protection of Children Act 1978 in order to thwart the circulation of child pornography over computer networks and meet the challenges posed by new digital manipulation techniques and the emergence of graphic software packages. The definition of a 'photograph' was extended to include computer generated photographs¹⁸ as well as pseudo-photographs.¹⁹ In addition, the creation offence under s 1 of the 1978 Act, i.e. 'to take' any IIOC, was amended by inserting the words 'to make' to accommodate the inclusion of the new term 'pseudo-photograph'.²⁰ As discussed below, the interpretation of the making offence has given rise to legal controversies and sentencing problems. Since the beginning of the new millennium, prosecutions for possession of, and taking, permitting to take, distributing and making IIOC have substantially increased²¹ and continue to rise.²²

Under s 1(1)(a) of the 1978 Act, it is an offence for a person to take, or permit to be taken or to make, any indecent photographs or pseudo-photographs of a child. A framework of

¹² See for example *Cassidy v Daily Mirror Newspapers* [1929] 2 KB 331 or the more recent *Lord McAlpine of West Green v Sally Bercow* [2013] EWHC 1342.

¹³ [2008] EWCA Civ 130 [14] (Sir Anthony Clarke, MR).

¹⁴ *R v Collier* [2004] EWCA Crim 1411 [36].

¹⁵ Terry Thomas, *Sex Crime: Sex Offending and Society* (2nd edn, Willan Publishing, 2005); Jenny Kitzinger, 'The "paedophile-in-the-community" protests: press reporting and public responses' in Gayle Letherby, Kate Williams, Philip Birch and Maureen Cain (eds), *Sex as Crime* (Willan Publishing 2008).

¹⁶ Hazel Croall, *Crime and Society in Britain* (2nd edn, Pearson 2011) 273.

¹⁷ Home Affairs Committee, *First Report on Computer Pornography* (HC 1993-94, 126) v.

¹⁸ Criminal Justice and Public Order Act 1994, s 84(3)(b): 'data stored on a computer disc or by other electronic means which is capable of conversion into a photograph'.

¹⁹ Criminal Justice and Public Order Act 1994, s 84(3)(c): a pseudo-photograph is 'an image, whether made by computer-graphics or otherwise howsoever, which appears to be a photograph.' Similar changes were introduced to s 160 of the Criminal Justice Act 1988 which penalises the possession of IIOC.

²⁰ Protection of Children Act 1978, s 1(a) as amended by the Criminal Justice and Public Order Act 1994, s 84(2)(a).

²¹ Yaman Akdeniz, *Internet Child Pornography and the Law: National and International Responses* (Ashgate Publishing 2008) 25; HC Deb 13 October 2009, vol 497, col 846W (Written Answers, Claire Ward, Parliamentary Under Secretary of State for Justice)

<<http://www.publications.parliament.uk/pa/cm200809/cmhansrd/cm091013/text/91013w0018.htm#0910152000036>> accessed 13 April 2017.

²² CPS, *Violence against Women and Girls Crime Report 2015-16* (CPS 2016) 88.

statutory defences to IIOC-related offences has been created to protect those whose possession of such images is not prurient, but s 1(1)(a) has been purposefully omitted from it: 'no statutory defence is available for the individual who creates the material or advertises its availability.'²³ In *Bowden*,²⁴ the Court of Appeal held that downloading and printing out of IIOC from the Internet could amount to the offence of making such images under s 1(1)(a) of the 1978 Act. The appellant had downloaded indecent images of young boys from webpages and had either stored them on his computer discs or printed them out. The Court of Appeal rejected the argument that he merely possessed the images contrary to s 160 of the Criminal Justice Act 1988 and did not make them under the 1978 Act:

Quite simply, [section 1] renders unlawful the making of a photograph or a pseudo-photograph. There is no definition section. Accordingly, the words 'to make' must be given their *natural and ordinary meaning*. In this context, this is 'to cause to exist; to produce by action, to bring about' (Oxford English Dictionary). As a matter of construction such a meaning applies not only to original photographs but [...] also to negatives, copies of photographs and data stored on computer disk.²⁵

Despite the technically correct ratio, the ruling extended the offence 'beyond what [was] absolutely necessary given the existence of the offence of mere possession.'²⁶ The Court's interpretation has been strongly contested on the grounds that the appellant was not responsible for bringing the images to life. He merely copied or accessed copies of pre-existing images online and did not originally create them himself.²⁷ These are quite distinct acts both in terms of the conduct and the degree of severity involved. Moreover, while the legislative wording chosen in s 1(1)(a) of the Protection of Children Act 1978 is somewhat ambiguous, it does not appear to have been Parliament's intention to regard making copies of existing IIOC by means of downloading as a creation offence under the same section. The latter reads: 'it is an offence for a person to take [or to make] any indecent photograph [or pseudo-photograph] of a child'. The verb 'to make' was added together with the words 'pseudo-photograph',²⁸ demonstrating the legislator's intention to outlaw the making, or creation, of pseudo-photographs.²⁹ It is thus questionable whether the verb 'make' should be understood as mere downloading. Nevertheless, the approach in *Bowden* was followed in the subsequent cases of *Atkins v DPP* and *Goodland v DPP*,³⁰ where the Court of Appeal rejected the argument that *Bowden* was wrongly decided and held that making includes copying, downloading or storing photographs on a computer, and a person who did such an act intentionally and knowing that the image was, or was likely to be, an IIOC, would be guilty

²³ *R v Land* [1998] 1 Cr App R 301, 305 (Judge LJ). Some limited exceptions to this general rule have been created by the Sexual Offences Act 2003; see ss 45(1), 45(3), 45(4) with respect to marriage and other relationships as well as s 46 of the same regarding exceptions from criminal proceedings, investigations etc.

²⁴ *R v Bowden* [2000] 1 Cr App R 438.

²⁵ *ibid* 444 (Otton LJ) (emphasis added).

²⁶ David Ormerod, 'Indecent photographs of children: whether downloading an image amounted to "making" a photograph' [2000] (May) Crim LR 381, 383.

²⁷ Akdeniz (n 21) 50.

²⁸ The words in square brackets were inserted by the Criminal Justice and Public Order Act 1994, s 84(2).

²⁹ See further Akdeniz (n 21) 50. The author cites Mr David Maclean, MP for Penrith and The Border from 1983 to 2010, who explained during Parliamentary proceedings that the amendment to s 1 'simply provides that a pseudo-photograph is an image, whether made by computer graphics or by any other means of technology that make it appear to be a photograph' (emphasis added); see generally HC Deb 15 February 1994, vol II, cols 741–2.

³⁰ [2000] 2 Cr App R 248.

of an offence under s 1(1)(a).³¹ The Court of Appeal was not persuaded by the Magistrates' ruling in *Atkins* that: 'Since biblical times, the Maker has been the Creator, that is he has fashioned something new. [...] "Made" still means "created", "novated", "fabricated" [...]. It does not mean "stored", "isolated", or "reserved" in whatever form.'³²

It is, however, argued that *Bowden* was 'a creature of necessity'³³ considering the sentencing regime at the time. Prior to the amendments introduced by the Criminal Justice and Court Services Act 2000, offences under s 1 and s 160 (the possession offence) were punishable by up to three years' and six months' imprisonment respectively.³⁴ The Court of Appeal felt that a stricter approach was required in relation to images which may have originated from outside the jurisdiction and had not previously existed therein, but sprang into existence in the country, or were brought into it, for the first time though downloading from the Internet.³⁵ Responding to the rapid developments in communication technology, courts tried steadfastly to counter the challenges presented by the migration of incriminating material onto the Internet. Perhaps understandably, judges relaxed language restrictions and threw the net of potential criminal liability as wide as possible to capture every new way in which child sexual abuse images may be exploited.

Since 2000, the Court of Appeal has been reluctant to revisit the meaning of making. The law in this area remains Draconian, working against offenders 'at every turn.'³⁶ Compounding the situation is the blurred distinction between making and possession offences resulting from *Bowden*.³⁷ Subject to the requisite mental element, a charge of making is also usually 'preferable'³⁸ to a charge of possession, which is better reserved for cases where there exists unambiguous evidence of possession (e.g. the suspect has printed copies of the images in question). The current approach allows an offender who downloaded IIOC and stored (possessed) them in their computer to be charged with an offence under s 1(1)(a) of the 1978 Act and placed under the same category as an offender who produces photographs using a digital camera while sexually abusing a child. The different levels of severity will most likely be reflected in sentencing.³⁹ However, greater clarity on the meaning of the term 'making' does not seem to be provided by the Sentencing Council, according to which the making of any image at source, e.g. the original image, qualifies as production or creation of the indecent photograph.⁴⁰ Further clarification in this area is welcome. As Akdeniz observes,

³¹ *ibid* 260.

³² *ibid* 254.

³³ Alisdair Gillespie, 'Revisiting *Bowden*: downloading Internet images' (2005) 155(7179) NLJ 857, 858.

³⁴ Criminal Justice and Court Services Act 2000, ss 41(2) and 41(3). As a result, possession of IIOC is now punishable on indictment with up to five years' imprisonment, whereas the offence of taking or making IIOC is punishable on indictment with up to ten years' imprisonment.

³⁵ *Bowden* (n 24) 445.

³⁶ Gabrielle Moore, 'Indecent Images: The Shift in Recent Years from "Possession" to "Making"' (2016) 3(3) Criminal Bar Quarterly 13.

³⁷ Akdeniz (n 21) 55.

³⁸ CPS Legal Guidance, *Indecent Images of Children*

<http://www.cps.gov.uk/legal/h_to_k/indecent_images_of_children/#a06> accessed 5 April 2017.

³⁹ Sentencing Council, *Sexual Offences Definitive Guideline* (Sentencing Council 2014) 75-9.

⁴⁰ *ibid* 76: 'Production includes the taking or making of any image at source, for instance the original image.'

‘these are offences carrying incredible stigma and should be interpreted to avoid such mislabeling.’⁴¹

From a legal perspective, it is therefore commonly accepted that the offence of making a child sexual abuse image can be committed by intentional acts involving downloading an image onto a disc or from a website onto a computer screen,⁴² opening email attachments,⁴³ accessing a website in which images appeared by way of automatic ‘pop up’ mechanism,⁴⁴ caching or even enlarging a thumbnail image on screen while web-browsing. None of these acts involve being present at the scene of an act of indecency on a child. Reasonable readers who were legally trained or were otherwise familiar with the law in this area would not have taken the charge in the CPS press release to be alleging personal involvement at the scene. They would have known other special facts that would negate the meaning of the libel alleged by the claimant. The meaning which expert lawyers would ascribe to the CPS statement would bear a lesser defamatory meaning and so run counter to the claimant’s argument.⁴⁵ They would have concluded that the CPS was probably alleging a criminal offence committed by viewing images online, downloading or other similar conduct. The reference of the headline of the Announcement to the images (‘Vladimir Bukovsky to be prosecuted over indecent images of children’) would have contributed to that conclusion. But, what about the non-experts, who perhaps represented a comparatively larger subset of readers?

The meaning of the words as a matter of fact

The natural and ordinary meaning of the words in the press release issued to the public at large is not necessarily determined by the meaning which the same words have as a matter of statutory interpretation. It was argued on behalf of Bukovsky that ‘the very same words can [...] have different meanings as a matter of fact than they do [...] as a matter of law.’⁴⁶ Whether these words do have a different meaning is a question of fact for the judge to decide.

It was submitted on behalf of the claimant that ordinary, reasonable readers of the mainstream media outlets which reproduced the Charging Announcement, or its essence, would not have read ‘making’ as meaning an act limited to accessing an image online or storing electronic copies of it. To them, making would mean producing a two-dimensional depiction which captures the photographer’s real-life surroundings. In addition, the fact that the act of making child sexual abuse images was to be charged separately from the act of possession of such images would not go unnoticed by ordinary and reasonable readers, who would naturally infer that the person must have witnessed the sexual abuse portrayed in the images, which he continued to possess.⁴⁷

⁴¹ Akdeniz (n 21) 57.

⁴² Bowden (n 24); *R v Jayson* [2002] 1 Cr App R 13.

⁴³ *R v Smith* [2002] EWCA Crim 683.

⁴⁴ *R v Harrison* [2008] 1 Cr App R 29.

⁴⁵ *Bukovsky* (n 1) [21] (Warby J): ‘For this reason, the innuendo meaning seems to me to be in reality self-defeating’.

⁴⁶ *ibid* [19].

⁴⁷ *ibid* [24].

The CPS denied that the Charging Announcement bore the meaning claimed by Bukovsky. It submitted that the claimant's argument failed to comply with the legal principles concerning the determination of meaning.⁴⁸ First, the argument relied only on a few isolated words in the Announcement, ignoring the principle that the ordinary reader is assumed to have read the publication as a whole. In addition, it overlooked the requirement to attribute to the hypothetical referee a suitable degree of the common knowledge that words in statutes can have technical meaning and assumed a reader who was unduly suspicious.⁴⁹ Moreover, the use of awkward and unusual language would prevent the ordinary, reasonable reader from reaching hasty conclusions about the precise nature of the conduct alleged by the CPS.⁵⁰

In Warby J's judgment, the words complained of did not carry the defamatory meaning that the claimant attributed to them. The natural and ordinary meaning of the words was that:

- 1) Mr Bukovsky was to be charged with offences of making indecent photographs of children contrary to section 1 of the Protection of Children Act 1978, possessing indecent photographs of children contrary to section 160 of the Criminal Justice Act 1988, and possession of a prohibited image contrary to section 62 of the Coroners & Justice Act 2009;
- 2) The evidence in support of such charges was sufficiently convincing to justify a prosecution of Mr Bukovsky, and it was in the public interest to do so.⁵¹

The ordinary, reasonable reader would consider the nature and source of the publication, which would be recognised as 'a formal public announcement by a public authority of a considered decision to bring specific criminal charges under specified statutory provisions against a named individual'.⁵² Reference was also made to the Code for Crown Prosecutors. Although ordinary, reasonable readers would probably not be familiar with its details, they would understand that the prosecutorial decision-making is governed by strict rules and that the CPS would only bring charges if they were satisfied that there was a 'good or reasonable prospect'⁵³ of convincing a jury of Bukovsky's guilt. Reasonable readers would expect that the words chosen by the CPS followed the contours of the relevant law and would know that even seemingly commonplace words like 'making' could have 'special meanings'⁵⁴ when used in a legal context. Interestingly, Warby J stated that if these ordinary words were spoken or written by a journalist, or by a friend in an informal context, the reasonable reader would treat them differently.⁵⁵ However, this approach sits perhaps uncomfortably with the fact that the Charging Announcement was after all a press release issued as part of the journalistic function of the CPS Press Office.⁵⁶ It is therefore unclear why the hypothetical reader would engage with the description of the criminality alleged in this source differently.

It was also submitted by the claimant, and accepted by Warby J, that some professional photographers use the phrase 'making a photograph' to describe what they typically do.

⁴⁸ *Jeynes* (n 13) [14] (Sir Anthony Clarke MR).

⁴⁹ *ibid.*

⁵⁰ *Bukovsky* (n 1) [26].

⁵¹ *ibid* [27].

⁵² *ibid* [28].

⁵³ *ibid* [29].

⁵⁴ *ibid* [30].

⁵⁵ *ibid*: 'I do not accept that the ordinary reasonable reader would treat the ordinary English words in this announcement in the same way as they would treat them if spoken or written by a journalist, or by a friend in ordinary conversation' (Warby J).

⁵⁶ The term 'press release' is used to describe the Charging Announcement in paras [1] and [19] of the judgment.

However, this was deemed technical language. It would not be readily understood as the act of pressing the button on a camera and would not be indicative of the ordinary reader's understanding of a term which described a criminal charge; 'this unusual use of language would put the ordinary reader on guard.'⁵⁷

Warby J went on to state that 'making' is commonly understood as 'creating or producing'.⁵⁸ This interpretation closely mirrors the natural and ordinary meaning which the Criminal Division of the Court of Appeal controversially attached to the verb 'to make' in *Bowden*, i.e. 'to cause to exist; to produce by action; to bring about'.⁵⁹ According to the same ruling, the natural and ordinary meaning of the word 'make' as 'producing by action' also applies to *original* photographs,⁶⁰ and not only to digitally stored copies of them. Taking both these interpretations into account, it could be suggested that some form of participation in the creation of indecent photographs was a reasonably sensible interpretation of the factual allegation made by the CPS. Warby J's remark *in obiter* that 'the same words [here, 'making'] *could* have a meaning for the purposes of defamation law which is different from their technical legal meaning'⁶¹ left the door 'slightly ajar'⁶² and tacitly admitted that the matter was capable of bearing a defamatory meaning.

Nevertheless, according to the judge, there was nothing in the wording of the Charging Announcement to justify the conclusion that the CPS ascribed a role to Bukovsky at the indecent scene or that they adopted a particular meaning of the term 'making' which referred only to the claimant's physical presence as a photographer at the scene of any child sexual abuse.⁶³ This was not what a reasonable, 'not avid for scandal',⁶⁴ reader would infer from the CPS press release. Whilst it could not be ruled out that a reader might have thought that Bukovsky acted as the photographer, that would represent a 'strained, forced or unreasonable'⁶⁵ interpretation of what the CPS was alleging.

Finally, Warby J acknowledged that there was force in the CPS' alternative submission that had ordinary readers given further thought to what conduct was being alleged, they would have reached the same conclusion as expert readers.⁶⁶ In recent years, several well-known public figures have gained notoriety through widespread press coverage of accusations and convictions related to child sex offences. Some have been accused of downloading indecent images, whilst others have been charged with committing acts of sexual abuse and exploitation against children. But, in Warby J's judgment, it is the downloading of unlawful images that has come to dominate public discourse⁶⁷ and therefore if the ordinary, reasonable reader had read into the CPS Announcement some implication about the exact nature of

⁵⁷ *Bukovsky* (n 1) [31].

⁵⁸ *ibid* [32].

⁵⁹ *Bowden* (n 24) 444; see also *Atkins* (n 30) and *Smith* (n 43).

⁶⁰ *Bowden* (n 24) 444 (Otton LJ).

⁶¹ *Bukovsky* (n 1) [19] (emphasis in the original).

⁶² Max Campbell, 'Soviet dissident fails in trial of meaning against CPS' (*The Brett Wilson Media Law Blog*, 19 September 2016) <<http://www.brettwilson.co.uk/blog/soviet-dissident-fails-trial-meaning-cps/>> accessed 28 April 2017.

⁶³ *Bukovsky* (n 1) [32].

⁶⁴ *ibid*.

⁶⁵ *ibid*.

⁶⁶ *ibid* [33].

⁶⁷ *ibid* [34].

conduct underlying the charges, they would have assumed, based on their general knowledge, that Bukovsky was accused of an offence of that variety.⁶⁸ The shortcomings of this approach are discussed in the following section.

Ordinary, reasonable readers in a modern, multi-mediated world

Individuals who show a strong sexual interest towards, or engage in sexual activities with, children are considered to be amongst the most hated deviants in society⁶⁹ and are stigmatised by the community. Society's anxiety over such individuals often reaches the levels of a moral panic.⁷⁰ Acquiring a 'paedophile' label can have a detrimental impact not just on an individual's reputation, but also on his/her personal safety. The lynch mob climate on the Paulsgrove housing estate in Portsmouth and the brutal attacks against suspected (often wrongfully) sex offenders around Britain in the wake of the *News of the World's* 2000 naming and shaming campaign attest to this.⁷¹ Writing about the event that triggered this campaign (Sarah Payne's murder), *Daily Mirror* journalist Brian Reade claims to be speaking for every parent in Britain when stating: 'I want whoever killed little Sarah to spend his life dodging razor blades in his food, needing an armed guard when he takes a shower and fearing his throat being slashed every night. Hanging these bastards really IS too good for them.'⁷² Whilst such extreme social reactions to the sexual victimisation of children and the problems relating to tabloid and vigilante justice go beyond a *stricto sensu* legal consideration of the libel case brought by Bukovsky, they are essential to understanding the severity of the relevant accusation. The law does not and should not operate in a vacuum.⁷³ As this section will argue, the wider socio-cultural context in which the CPS Charging Announcement was published - including the proliferation of media in 21st century societies and the heightened public concern over paedophilia - play a key part in the potential construction of a defamatory meaning and should have therefore been given further consideration.

The legal principles applying to the determination of meaning have been summarised in *Jeynes v News Magazines Ltd and Anr* as follows:

- (1) The governing principle is reasonableness. (2) The hypothetical reasonable reader is not naïve but he is not unduly suspicious. He can read between the lines. He can read in an implication more readily than a lawyer and may indulge in a certain amount of loose thinking but he must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available. (3) Over-elaborate analysis is best avoided. (4) The intention of the publisher is irrelevant. (5) The article must be read as a whole, and any 'bane and antidote' taken together. (6) The hypothetical reader is taken to be representative of those who would read the publication in

⁶⁸ *ibid* [33] – [36].

⁶⁹ Philip Jenkins, *Beyond Tolerance: Child Pornography on the Internet* (New York University Press 2001); Amir Rosenmann and Marilyn P Safir, 'Forced online: Pushed factors of Internet sexuality. A preliminary study of paraphilic empowerment' (2006) 51(3) *Journal of Homosexuality* 71; Thomas J Holt, Kristie R Blevins and Natasha Burkert, 'Considering the pedophile subculture on-line' (2010) 22(1) *Sexual Abuse: Journal of Research and Treatment* 3; Keith Durkin and Clifton D Bryant, 'Propagandizing pederasty: A thematic analysis of the online exculpatory accounts of unrepentant pedophiles' (1999) 20(2) *Deviant Behavior* 103; Keith Durkin, 'Misuse of the Internet by pedophiles: Implications for law enforcement and probation practice' (1997) 61(3) *Federal Probation* 14.

⁷⁰ Chas Critcher, *Moral Panics and the Media* (Open University Press 2003).

⁷¹ Ian Marsh and Gaynor Melville, *Crime, Justice and the Media* (2nd edn, Routledge 2014).

⁷² Brian Reade, 'The Search for Sarah: Body Found' *Daily Mirror* (London, 18 July 2000) 1 (emphasis in the original).

⁷³ Matthew Lippman, *Law and Society* (Sage 2015).

question. (7) In delimiting the range of permissible defamatory meanings, the court should rule out any meaning which, 'can only emerge as the produce of some strained, or forced, or utterly unreasonable interpretation'. (8) It follows that 'it is not enough to say that by some person or another the words might be understood in a defamatory sense.'⁷⁴

In assessing whether the matter is capable of conveying a defamatory meaning of the claimant and whether it does in fact convey a defamatory meaning, the judge applies the objective test of the 'ordinary, reasonable reader', as opposed to the subjective response of the decision-maker. Whether the alleged libel is established depends on the understanding of hypothetical referees who presumably embody a uniform view on the meaning of the words used and share a moral or social standard that is common to the society generally.⁷⁵ No evidence may be adduced on this standard. It used to be a matter for the jury's consideration in their representative capacity.⁷⁶ The presumption that such a moral or social standard exists and is shared by all 'right-thinking members of society' is however quite problematic in contemporary pluralistic and multi-cultural societies.⁷⁷ Given the increased social anxiety over child sexual victimisation, this plurality of views in modern societies does not mean that the interpretation of the term 'making' in Bukovsky's case as 'downloading' rather than 'being personally involved in the sexual abuse of children' would not still carry a negative meaning; instead, the plurality indicates that the process through which the ordinary, reasonable reader would interpret the term is much more complex and diverse nowadays. Late modernity has led to the creation of media-saturated, celebrity-centred societies whose members actively participate in the construction of meaning, breaking away from the restrictive top-down processes of the past.⁷⁸ From this perspective, the ordinary reader is indeed inclined to read between the lines and reach a reasonable conclusion in accordance with the second *Jeynes* principle. At the same time, however, there are some important questions to be raised about the criteria of the *Jeynes* test: to what extent does the medium used impact on the message conveyed? Also, and most importantly, does the 'not avert for scandal' provision of the second *Jeynes* principle still apply in late modern societies?

As famously argued by media scholar Marshall McLuhan long before the invention of the Internet, 'the medium is the message',⁷⁹ that is, the content of a message is intrinsically linked to the medium it is communicated through. With reference to electronic media for communication, Burkell and Kerr similarly state that '[their] use alters the social context within which these communications are both produced and received, and thus the content of communication can be understood only when this modified context is taken into account.'⁸⁰ The medium in which a defamatory remark is presented, or its manner of publication, is part of its context and constitutes a material fact in establishing what imputation is conveyed.⁸¹

⁷⁴ *Jeynes* (n 13) [14] (Sir Anthony Clarke MR).

⁷⁵ See for instance 'right-thinking members of society generally' in *Sim v Stretch* [1936] 2 All ER 1237, 1240 (Lord Atkin); 'reasonable men' in *Capital and Counties Bank v Henty* (1882) LR 7 App Cas 741, 745 (Lord Selborne); 'ordinary man and woman' in *Rubber Improvement Ltd and Anr v Daily Telegraph Ltd* [1964] AC 234 and 'the ordinary good and worthy subject of the king' in *Byrne v Deane* [1937] 1 KB 818, 833 (Slesser LJ).

⁷⁶ David Rolph, *Reputation, Celebrity and Defamation* (Routledge 2016) 67.

⁷⁷ *ibid.*

⁷⁸ Yvonne Jewkes, *Media and Crime* (3rd edn, Sage 2015).

⁷⁹ Marshall McLuhan, *Understanding Media* (McGraw-Hill 1964) 9.

⁸⁰ Jacquelyn Burkell and Ian R Kerr 'Electronic Miscommunication and the Defamatory Sense' (2000) 15(1) Canadian Journal of Law and Society 81, 84.

⁸¹ *Lewis v Daily Telegraph Ltd* [1963] 1 QB 340, 374.

The ordinary, reasonable reader test requires the court to exclude any strained, forced or utterly unreasonable interpretations⁸² based on the standard of comprehension of likely readers.⁸³ Had the CPS Charging Announcement about Bukovsky been published in a legal magazine, its meaning would have been tested by its impact on lawyers or other readers with knowledge. In this case, however, the publication was not just addressed at legal experts already familiar with the technical use of the term ‘making’. It was a press release clearly aimed to reach a much wider audience. This is evident from the fact that, as mentioned in the judgment, the Announcement was published on the CPS website and its official blog, while a link to the blog was also posted on the CPS Twitter account.⁸⁴ In an era of media convergence, where all sources of information are interconnected,⁸⁵ one would not need to actively follow the CPS’ online activities to access the Announcement; instead, the public could possibly come across it through the sharing of this content by third parties on their online social networks⁸⁶ and through search engines like Google or hyperlinks from news websites. The CPS Announcement attracted a considerable amount of media attention and its substance was widely republished in newspaper websites like those of *The Guardian*, *Daily Mail* and *Daily Telegraph* as well as on TV news programmes of the BBC and ITV.⁸⁷ Focusing on the terms of the CPS Charging Announcement that the libel case was brought against, it is obvious that the audience of non-experts it addressed is far from homogeneous, ultimately including anyone with Internet access irrespective of education level, cultural background and place of residence. There would therefore inevitably be various interpretations of the content of the CPS release. But who among this heterogeneous audience would be considered an ordinary, reasonable reader in the legal sense of the term?

The ordinary, reasonable reader does not ‘live in an ivory tower’.⁸⁸ He is an ordinary member of society whose interaction with his social surroundings influences the meaning-construction process. He is a layman, whose capacity for implication is ‘much greater than that of a lawyer’⁸⁹ and who makes sense of social reality based on ‘his general knowledge and experience of worldly affairs’.⁹⁰ The role of the media in the acquisition of this secondary rather than first-hand knowledge and experience is vital, especially in the age of 24/7 news.⁹¹ According to Warby J, the ordinary reader in Bukovsky’s case has come across news stories about several well-known public figures charged with child sex offences in recent years. As a result of this acquired knowledge, he is reasonably expected to be able to distinguish between ‘carrying out acts of sexual abuse on children’ and ‘making’ indecent images.⁹² However, no empirical evidence from audience reception studies is provided in the judgment in support of

⁸² *Jeynes* (n 13) [14].

⁸³ Geoffrey Robertson and Andrew Nicol, *Media Law* (5th edn, Penguin 2008) 108.

⁸⁴ *Bukovsky* (n 1) [9].

⁸⁵ Henry Jenkins, *Convergence Culture: Where Old and New Media Collide* (New York University Press 2006).

⁸⁶ For instance, the CPS tweet about Bukovsky was retweeted 11 times (see CPS, ‘Vladimir Bukovsky, 72, faces trial over indecent images of children following investigation by @CambsCops’ <<https://twitter.com/cpsuk/status/592675959658131456>> accessed 19 May 2017).

⁸⁷ *Bukovsky* (n 1) [9].

⁸⁸ *Rubber Improvement Ltd and Anr v Daily Telegraph Ltd* [1964] AC 234, 258 (Lord Reid).

⁸⁹ *ibid* 277 (Lord Delvin).

⁹⁰ *ibid* 258 (Lord Reid).

⁹¹ Ray Surette, *Media, Crime and Criminal Justice: Images, Realities and Policies* (5th edn, Cengage 2011).

⁹² *Bukovsky* (n 1) [36].

this argument. In fact, as explained in the following paragraphs, a counter-argument could be made that, based on the society he lives in and the information he is exposed to through the media on an everyday basis, it would be unreasonable to expect the ordinary reader to make the abovementioned distinction, interpreting the term ‘making’ as merely ‘downloading’ and not personally participating in or attending at the indecent event.

Through the advancement of information and surveillance technologies, scandals have nowadays turned into spectacles that constitute an endemic element of late modern societies and normalise their voyeuristic tendencies.⁹³ ‘Scandal hunting has become a standard feature of the UK’s adversarial media and political landscapes.’⁹⁴ In his report on press standards, Lord Leveson acknowledges that, even if it is not in the public interest, the publication of scandalous, private and defamatory material interests the public in a voyeuristic sense.⁹⁵ Taking into account the cultural significance of scandals in our modern multi-mediated world, Warby J’s unsubstantiated claim that the thoughtful, ordinary reader, well informed about child abuse, would select a less defamatory meaning arguably reflects an idealistic rather than realistic view⁹⁶ of contemporary society. We therefore argue that, in an era when scandals (from simple ‘gotcha’ moments like Kate Moss sniffing cocaine in a London nightclub to more serious cases like the *News of the World* phone hacking) constitute an appealing and even sought-after component of the public’s everyday media diet,⁹⁷ the view of the ordinary reader as someone who is ‘not avid for scandal’⁹⁸ needs to be revisited.

Most importantly, as Furedi⁹⁹ points out, there is nowadays an epidemic of scandals, that is, scandals are so rife that they no longer represent a temporary disruption of society’s moral order, but the continuation of an ongoing cycle. In that sense, the Jimmy Savile scandal in the UK overlapped with and ultimately succeeded the Leveson Inquiry into the phone hacking scandal which in its turn succeeded scandals about parliamentary expenses and so on. This age of scandals that we live in, Furedi argues, is inevitably also an age of mistrust of other people and society’s institutions, especially when the matter at issue is children’s protection from sexual abuse. The impact of the Jimmy Savile scandal on the British society was such that, according to the Child Exploitation and Online Protection Centre (CEOP), it triggered the so-called ‘Savile effect’: it led to a 30% increase in reports of abuse¹⁰⁰ and greater scrutiny into institutional child sexual abuse in residential homes in London and north Wales.¹⁰¹ The more recent football sexual abuse scandal could also largely be regarded as a

⁹³ Clay Calvert, *Voyeur Nation: Media, Privacy and Peering in Modern Culture* (Westview Press 2000); Kathleen M Kuehn, ‘An “Office Sex Romp” and the Economic Motivations of Mediated Voyeurism’ in Hinda Mandel and Gina Masullo Chen (eds), *Scandal in a Digital Age* (Palgrave 2016).

⁹⁴ Chris Greer and Eugene McLaughlin, ‘The Sir Jimmy Savile scandal: Child sexual abuse and institutional denial at the BBC’ (2013) 9(3) *Crime, Media, Culture* 243, 244.

⁹⁵ The Right Honourable Lord Justice Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press: Volume II* (The Stationery Office 2012) 607.

⁹⁶ For the idealistic/realistic dichotomy in defamation cases see Rolph (n 76).

⁹⁷ Frank Furedi, *Moral Crusades in an Age of Mistrust* (Palgrave 2013).

⁹⁸ Jeynes (n 13) [14] (Sir Anthony Clarke MR).

⁹⁹ Furedi (n 97).

¹⁰⁰ ‘NSPCC campaign reminds people abuse is not just in the past’ (*BBC News*, 14 December 2012) <<http://www.bbc.co.uk/news/uk-20716300>> accessed 7 May 2017.

¹⁰¹ Greer and McLaughlin (n 94).

result of this Savile effect.¹⁰² In the wake of the Savile scandal, the National Society for the Prevention of Cruelty to Children (NSPCC) encouraged people to act on their suspicions of abuse rather than wait for a certainty that may never come.¹⁰³ In that way, ‘the Savile effect provided a powerful object lesson that acting on the basis of suspicion and mistrust is the sensible way of behaving towards others’.¹⁰⁴

Within this climate of mistrust in the aftermath of the Savile scandal, it is questionable whether the ordinary, reasonable readers of the CPS Announcement about Bukovsky would clearly favour a technical interpretation of the term ‘making’ as ‘downloading’, in preference to a more defamatory meaning. It is suggested that exactly because ordinary, reasonable readers are nowadays, as Warby J points out, thoughtful and well-educated about Savile and other sexual abuse cases, they would be much more likely to believe that the claimant was personally involved in the sexual abuse of children. Going back to the problematic second principle of the *Jeynes* test,¹⁰⁵ the Savile effect suggests that the ordinary readers would not select a less defamatory meaning where other more defamatory meanings are available. This argument, based on a realistic view of the interpretative process, takes the hypothetical referee out of his ‘ivory tower’ without, however, depriving him of his reasonableness. The ordinary, reasonable reader in the post-Savile era is most certainly not naïve but not *unduly* suspicious either. However, due to living in a multi-mediated world of scandals and mistrust, his reasonableness has inevitably changed meaning: it no longer refers to achieving a balance between being naïve and unduly suspicious. In late modern societies, such a balance no longer exists since the scale of reasonableness leans slightly and by default towards the side of reasonable (rather than undue) suspicion. This paper argues that it is precisely this reasonable suspicion of the 21st century ordinary reader that was largely overlooked in Bukovsky’s libel case and that would have, in all probability, led to a favourable outcome for the claimant had it been taken into consideration.

Concluding remarks

In this preliminary hearing, Warby J had to determine what the publication being sued over imputed about the claimant. The judge held that the words complained of were not capable of bearing the defamatory meaning Bukovsky alleged. The remaining elements of the tort of defamation were not at issue. As discussed, the Charging Announcement was communicated to third parties and its substance was widely republished on the websites of national media and by broadcasters. Furthermore, the issue of the identification of the claimant was not in question, since a direct reference to Bukovsky was made in the press release. Finally, the meaning of the statement complained of is a key factor affecting whether the ‘serious harm’ test under s 1 of the Defamation Act 2013 has been met.¹⁰⁶ Had the outcome of the preliminary issue trial been in favour of the claimant, he would have had a real prospect of

¹⁰² Daniel Taylor, ‘Former England footballer David White was sexually abused by Barr’ *The Guardian* (London, 23 November 2016) <<https://www.theguardian.com/football/2016/nov/23/david-white>> accessed 7 May 2017.

¹⁰³ Angela Harrison, ‘Child abuse: NSPCC urges swift reporting of suspicions’ *BBC News* (London, 14 January 2013) <<http://www.bbc.com/news/education-20992710>> accessed 7 May 2017.

¹⁰⁴ Furedi (n 97) 95.

¹⁰⁵ *Jeynes* (n 13) (Sir Anthony Clarke MR).

¹⁰⁶ The Hon Mr Justice William Blair et al (eds), *Bullen and Leake and Jacob’s Precedents of Pleadings* (18th edn, Sweet & Maxwell 2015) [37-04].

establishing that the publication of the statement satisfied the serious harm requirement. A claimant has to, or may have to, adduce evidence of actual serious harm or its probability in order to meet the new threshold test, but it would be unlikely that such evidence would be required in Bukovsky's case. In *Cooke and Midland Heart Ltd v MGN*, Bean J held that:

Some statements are so obviously likely to cause serious harm to a person's reputation that this likelihood can be inferred. If a national newspaper with a large circulation wrongly accuses someone of being a terrorist or a paedophile, then in either case (putting to one side for the moment the question of a prompt and prominent apology) the likelihood of serious harm to reputation is plain, even if the individual's family and friends knew the allegation to be untrue.¹⁰⁷

Indeed, as Warby J stated in *Bukovsky*, 'it would be easy to infer that the widespread publication of an allegation of the kind complained of, or indeed an allegation of the kind that I have found the words to convey, would cause serious harm to a person's reputation.'¹⁰⁸

It is difficult to avoid some scepticism about the extent to which the judge's legal knowledge over the technical interpretation of 'making' and his professional experience more generally may have coloured his opinion on the meaning of the words complained of. It is also debatable whether sufficient consideration was given to what is generally known by the public and it seems possible that the court may have overestimated the degree of analytical attention and deliberation that ordinary, reasonable readers would have applied to the term 'making' in the press release. A rather wide degree of latitude may be given to the capacity of the matter complained of to carry certain imputations where the words published are loose, vague or atypical, such as 'making an indecent image'. As the Court of Appeal remarked in *Lewis v Daily Telegraph*, 'when persons publish words that are imprecise, ambiguous, loose, fanciful or unusual, there is room for a wide variation of reasonable opinion on what the words mean or connote. The publisher can hardly complain in such a case if he is reasonably understood as having said something that he did not mean.'¹⁰⁹

The criteria through which the ordinary reasonable reader constructs meaning in late modern societies need to be reconsidered. The principles outlined in *Jeynes* - mainly principle (2) - appear to be slightly outdated and the implications this has on defamation cases like that brought by Bukovsky are more than evident. Scandals, especially those involving the sexual victimisation of children, constitute an integral part of the 21st century media-dominated social reality.¹¹⁰ Within this dynamic media sphere of 24/7 news, the CPS' decision to publish its Charging Announcement on its official website, blog and Twitter account tacitly reveals the Service's intention for the Announcement's message to reach not just legal experts, but a much larger audience of laymen. Therefore, the assertion that the hypothetical readers of the CPS release would, in accordance with the *Jeynes* test, be 'not averse to scandal' is based on an idealistic rather than a realistic view¹¹¹ of the addressed audience and largely overlooks the social context within which the Charging Announcement would be interpreted. Most importantly, Warby J's uncorroborated argument - that because ordinary reasonable

¹⁰⁷ *Ruth Cooke, Midland Heart Limited v MGN Limited, Trinity Mirror Midlands Limited* [2014] EWHC 2831 [43].

¹⁰⁸ *Bukovsky* (n 1) [38].

¹⁰⁹ *Lewis* (n 81) 374.

¹¹⁰ Furedi (n 97).

¹¹¹ Rolph (n 76).

readers have through the media nowadays become familiar with the language used in child sexual abuse cases, they are most likely to interpret the term ‘making’ as ‘downloading’ - downplays the impact that high-profile cases like the Jimmy Savile scandal have had on the public conscience. It has been suggested that the Savile effect has cultivated and legitimised a climate of mistrust within which suspicion is reasonable and lack of it equals being naïve. In the post-Savile era, reasonableness no longer occupies the middle ground between being naïve and unduly suspicious, but has instead moved closer down the spectrum towards the latter. Reasonable rather than undue suspicion is the norm and, as a result, contrary to Warby J’s claims in Bukovsky’s case, the ordinary reasonable reader in late modern societies should not in this context be expected to favour a less defamatory meaning when a more defamatory one is available.

ACCEPTED